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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL FLORES,

Defendant and Appellant.

D074714

(Super. Ct. Nos. RIF1305038,
RIF1309157)

APPEAL from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Affirmed and remanded with instructions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Manuel Flores of kidnapping (Penal Code,¹ § 207, subd. (a)) and found true enhancements that he discharged a firearm causing great bodily injury and committed a crime for the benefit of, in association with, or at the direction of a criminal street gang. (§§ 12022.53, subds. (d) & (e), § 186.22, subd. (b)(1)(c).) It also convicted him of criminal street gang activity (§ 186.22, subd. (a)) and misdemeanor giving false information to a peace officer. (§ 148.9 (a).) The court declared a mistrial on the attempted murder count (§§ 187, subd. (a), 664) because the jury could not reach a unanimous verdict, and the court subsequently granted a motion to dismiss the count in the interest of justice. Flores admitted the section 12022.1 enhancement for committing a felony while out on bail, as well as four prior prison sentences (§ 667.5, subd. (b)), and the court imposed a total prison sentence of seven years, plus 25 years to life for the firearm enhancement.

On appeal, Flores challenges the jury's true finding that he committed a crime for the benefit of, in association with, or at the direction of a criminal street gang, contending it was ineffective assistance of counsel not to object to the prosecution's questions for the gang expert. Flores also seeks resentencing on the firearm enhancement due to a statutory amendment to section 12022.53, which now gives the court discretion in imposing the sentence, and he requests we strike the four prior prison sentences, contending the trial court erroneously stayed them.

¹ Statutory references are to the Penal Code unless otherwise stated.

The Attorney General contends there was no ineffective assistance of counsel because the prosecutor's questions for the gang expert were properly framed and the failure to object was tactical but concedes the case must be remanded for resentencing on the firearm enhancement and contends the erroneous stay of the sentences for the four prior sentences requires the matter to be remanded to address that portion of sentencing as well. We agree with the Attorney General. We affirm the convictions, but we remand the matter for resentencing considering the court's newly discovered discretion on the firearm enhancement and to correct errors in sentencing related to the four prior sentences.

I

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, Flores was charged with four counts: (1) receiving stolen documents (§ 496, subd. (a)); (2) receiving a stolen passport (§ 496, subd. (a)); (3) felon in possession of a firearm (§ 30305, subd. (a)); and (4) misdemeanor possession of instruments with intent to break and enter. (§ 466)

While out on bail for these charges, Flores was charged in August 2013 with six new counts: (1) attempted murder in the first degree (§§ 187, subd. (a), 664), discharge of a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)), and committing a crime for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)(A)); (2) kidnapping (§ 207, subd. (a)), discharge of a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)), and committing a crime for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22,

subd. (b)(1)(A); (3) active participation in a criminal street gang (§ 186.22, subd. (a)); (4) misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); (5) felony taking drugs into jail (§ 4573.6) and commission of the above felonies while out on bail (§ 12022.1); and (6) misdemeanor giving false information to a police officer (§ 148.9, subd. (a)). He was also charged with four prior offenses for which he served sentences. The cases were consolidated in 2014, and trial on the August 2013 charges occurred first.

Prosecution Case

Flores was an admitted member of the Corona Varrio Locos (CVL) gang, and the Jueses clique. He met Jesus Venegas Lopez (Venegas) through one of his roommates. They used drugs and played darts together. Venegas also sold or traded drugs to members of CVL. In August 2013, Flores gave Venegas a tablet to sell or take in exchange for drugs. Before Venegas could sell the tablet, it was stolen from his van. Venegas did not tell Flores the tablet went missing. Flores was frustrated that Venegas did not return the tablet or pay him for it.

On August 17, 2013, Missael Herrera, a CVL member, and several other members of the Jueses clique gave Flores a ride to get something to eat. That same evening, CVL gang members Peter and Thomas Cervantes asked Venegas for a ride, and Venegas picked them up at a gas station to take them home. Thomas Cervantes then contacted Herrera and told Herrera he was with Venegas. Herrera, Flores, and several members of the Jueses drove to where Venegas was dropping off Cervantes and pulled up in front of Venegas's vehicle. Flores and Herrera exited the truck and pointed a gun at Venegas.

Flores angrily told Venegas, "You fucked up," and asked Venegas to return his tablet.

Venegas drove the three of them to Flores's house while Flores pointed a gun at him.

At the house, Flores directed Venegas to the back room, where Flores and Herrera secured Venegas to a chair using masking tape and bungee cords. While Flores tied up Venegas, Herrera held the weapon, aiming it at Venegas's head. Venegas begged Herrera to release him, but Herrera continued to point the gun at him. When Flores exited the room, Venegas untied himself, and Herrera yelled to Flores that Venegas was escaping. Flores returned, and he and Venegas fought. Venegas pushed Flores toward Herrera, then he jumped through the window. The gun fired, and a bullet hit Venegas in the left buttock as he escaped. Flores looked out the window and ran to the front yard, then came back inside and screamed at Herrera, asking him why he had let Venegas go.

Venegas ran to the street corner, where he encountered a police officer who asked what happened and called paramedics. Venegas told the police officer he was in fear for his life. When Flores and Herrera heard approaching sirens, Herrera hid the gun in the backyard. He returned a few days later to retrieve the gun at the direction of the gang's vice-president. Word spread about the shooting.

Herrera was arrested about a week after the shooting. He told the police the incident was about getting Flores's tablet returned so Flores could buy drugs and get high.

During trial, the prosecutor questioned Detective Gary Griffitts as a gang expert. Detective Griffitts had been assigned to the case about a month before trial and knew Herrera from when he worked at the high school Herrera attended. Assuming the facts of

the case as restated by the prosecutor, Detective Griffiths opined the crimes were committed for the benefit of, at the direction of, or in association with the CVL gang.

Defense Case

At trial, Flores denied he was a gang member, testifying he joined the Jueses in the early '90s, but retired from the gang in the early 2000's, when "it was decided . . . that the gang, the clique wasn't going to be active" anymore.² Flores testified he happened upon Venegas's van while he was out with some of the Jueses members. Venegas told him he had given the tablet to someone else and would get the drugs in the morning but offered to wait at Flores's house until then. Flores testified he did not have a gun or threaten Venegas, but on the car ride to his house, Herrera gave him a gun, which Flores placed in his lap. Flores said after they arrived at the house, they got high, and Venegas unsuccessfully attempted to call the person who had the tablet. Flores was concerned Venegas would leave before getting drugs or the tablet for him, so Venegas offered to let Flores tie him up, which Flores did. When Flores left the room to shoot up methamphetamine, he heard a noise and returned; Venegas grabbed and threw him against a wall, then jumped out the window. Flores testified he did not see or fire the gun.

The defense attorney questioned its own gang expert, Enrique Tira, a licensed private investigator and retired police officer. Tira based his testimony on the discovery he read, the testimony he observed, and the facts of the case presented at trial. Tira

² He also testified he got tattoos of gang symbols in 2007, 2008, and 2010 or 2011, after he retired.

opined that although Flores was an active gang member of the Jueses, the crimes were personal in nature and not gang-related.

Verdicts and Sentencing

The jury found Flores guilty of kidnapping, as well as the related gang enhancement and the firearm enhancement. It also found him guilty of active participation in criminal street gang and giving false information to a peace officer. The jury could not reach a verdict on the attempted murder charge, and the court declared a mistrial. Upon a motion by the prosecutor, the court dismissed the attempted murder count in the interest of justice. Flores admitted to four prior felony prison terms.

The court sentenced Flores to five years for the kidnapping, plus two years consecutive for the section 12022.1 enhancement for committing the crime while out on bail. The court also imposed 10 years for the gang-related activity enhancement (§ 186.22, subd. (b)(1)(C)), which the court stayed, and 25 years to life for the firearm enhancement. (§ 12022.53, subds. (d) & (e).) The court imposed two years for the criminal street gang activity conviction, which it stayed under section 654, and it imposed no time for the misdemeanor conviction. Finally, the court imposed one year for each of the four priors but stayed those sentences. The total prison term was seven years, plus 25 years to life.

II

DISCUSSION

A. Ineffective Assistance of Counsel

Flores contends his federal and California constitutional rights were violated due to ineffective assistance of counsel because his attorney failed to object to hypothetically-framed questions directed to the prosecution's gang expert. He further contends there was no tactical reason not to object, and the failure to do so was prejudicial. We disagree.

1. *Legal Standards*

The Sixth Amendment and the California Constitution guarantee effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) To evaluate whether defense counsel rendered effective assistance, we consider whether his performance fell below an objective standard of reasonableness and whether there is a reasonable probability that absent the identified unprofessional errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*); *Ledesma*, at pp. 216-218.) When considering whether counsel's performance was deficient, we " 'exercise deferential scrutiny' " and do not "second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) We presume defense counsel rendered adequate assistance (*Ledesma*, at pp. 216-218), and "counsel's failure to object rarely provides a basis for finding incompetence of counsel." (*People v. Lewis* (2001) 25 Cal.4th 610, 661.)

Evidence Code sections 720 and 801 allow expert opinion from someone with special knowledge, skill, experience, training, or education when the subject matter is beyond common experience. This includes testimony regarding gang culture and habits when there is a gang enhancement allegation that requires the prosecution to prove the defendant committed crimes for the benefit of, at the direction of, or in association with a criminal street gang and with specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*); § 186.22, subd. (b)(1).)

A gang expert can offer an opinion based on a hypothetical situation, assuming the facts within the hypothetical are true. (See *People v. Moore* (2011) 51 Cal.4th 386, 405.) While the testimony cannot be based on speculation or conjecture (*People v. Richardson* (2008) 43 Cal.4th 959, 1008 (*Richardson*)), and the expert cannot testify as to a defendant's specific intent (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658), the expert may testify that a crime was gang-related. (*Ferraez, supra*, 112 Cal.App.4th at p. 930 [gang expert can explain how actions demonstrate activity was gang-related]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1209.)

Attorneys have considerable latitude in the choice of facts upon which to frame a hypothetical question (*Richardson, supra*, 43 Cal.4th at p. 1008), but gang expert testimony should track the evidence provided by the prosecution in the trial. (*People v. Vang* (2011) 52 Cal.4th 1038, 1047-1049, 1052 (*Vang*).) Opinions regarding hypotheticals do not interfere with the province of the jury because the jury must still

determine if the facts as stated in a hypothetical are true and, if not, the difference between the facts and the assumptions used in a hypothetical. (*Id.* at p. 1050.)

2. Analysis

On appeal, Flores identifies six exchanges between the prosecutor and gang expert Detective Griffitts that he contends were improperly permitted. We disagree. The questions were properly framed, and any objection would have been futile. (*People v. Price* (1991) 1 Cal.4th 324, 387 (*Price*) ["Counsel does not render ineffective assistance by failing to make . . . objections that counsel reasonably determines would be futile."].)

The prosecutor used hypothetical facts: "[A]ssume that the defendant is a member of the Jueses, CVL, on August 17, 2013. Assume that he got a firearm from another active CVL member. Assume that he then had CVL members set up Jesus Venegas and have him at a certain place at a certain time. And assume that he had an additional CVL member, Missael Herrera, come with him at the point that he went up to Jesus Venegas and held a loaded firearm, pointed at him, and ordered him to drive to a house, tied him up in a room, still at gunpoint, and then held him there for several hours with the help of that other CVL member, Missael Herrera, and then ultimately shot him when he was trying to escape because he was disrespected as we heard in this case." Then he asked Detective Griffitts: "Do you have an opinion as to whether or not this act by the defendant on that day was for the benefit of Corona Varrio Locos?"

The prosecutor repeated this tactic with her next two questions: "And assuming what you heard from Mr. Herrera, that the defendant was one of the enforcers of the Jueses, a leader and an older generation gang member that was scared - - or scared of

other members of his own gang, would it be important to him to act with violence and commit the crime the way he did to benefit his status and the gang as a whole?" This was followed by, "Do you have an opinion as to whether or not, assuming what you heard was true that the defendant in this case was actually teaching Mr. Herrera the ways of the Jueses and bringing him up within the gang would benefit the Jueses and CVL as a whole?"

Each question was steeped in evidence presented at trial and framed as a hypothetical question. And each time the prosecutor asked one of these questions, Detective Griffiths answered in the affirmative, then elaborated, treating the hypothetical facts as true and explaining why he reached his opinions. None of this testimony invaded the province of the jury because it all relied on the assumption that the evidence was true, a determination left to the jury's consideration. (See *Vang, supra*, 52 Cal.4th at p. 1050.) Moreover, the use of the defendant's and witnesses' names in the hypothetical questions did not destroy their hypothetical nature.³

Flores next challenges a series of hypothetical questions aimed at asking whether the crime was gang-related. The prosecutor asked Detective Griffiths to consider, based on stated facts, whether what happened benefitted CVL and the Jueses, whether the crime was in association with gang members, whether the crime was at the direction of CVL

³ Flores cites no authority to support the theory that using witnesses' names impedes the province of the jury or eliminates the hypothetical structure of the question. Because the hypothetical question must be "based on what the evidence showed *these* defendants did" (*Vang, supra*, 52 Cal.4th at p. 1046), it was not unreasonable to incorporate their names.

members, and whether there was active participation among gang members. Detective Griffiths answered these questions in the affirmative each time, and when he elaborated, he drew from the hypothetical facts to explain his thinking.

These questions fall within Detective Griffiths's area of expertise because they require knowledge of the culture of the gang. The responses assumed the truth of the hypothetical evidence, and Detective Griffiths explained how, based on gang culture and norms, the evidence supported his opinions. The testimony did not draw any legal conclusions or conclusions as to Flores's specific intent or guilt, and his testimony was useful to the jury in understanding the possible significance of the hypothetical actions and, thus, admissible. (See *Ferraez*, *supra*, 112 Cal.App.4th at p. 930.) Their admissibility means the defense attorney's failure to object was reasonable. (See *Price*, *supra*, 1 Cal.4th at p. 387.)

Moreover, even had the questions been objectionable, contrary to Flores's contention, his attorney had a tactical reason not to object. (See *People v. Frierson* (1979) 25 Cal.3d 142, 158 [decision to object to particular question is tactical].) Not objecting created an opportunity to ask similar questions of the defense's gang expert.

Several of the defense attorney's questions failed to use hypothetical facts. (See *Vang*, *supra*, 52 Cal.4th at p. 1046.) For example, the defense attorney asked, "[D]o you have an opinion as to whether the offense committed here was at the direction of, for the benefit of, or in association with other gang members?" Defense counsel also asked, "Do you have an opinion as to whether . . . the event that you heard took place in this case was for the benefit or to promote gang activity?"

Basing his opinion on what he read, the testimony and facts of the case, and his knowledge of gangs - but not hypothetical facts assumed to be true - defense expert Tira opined repeatedly that the crime "was a personal issue between the defendant and the victim," "and not a gang-related incident." Defense counsel failed to identify the specific evidence on which the expert relied so the jury could evaluate whether it disputed the underlying facts. Given his own reliance on questions referring to specific facts and parties in the matter, as well as questions directly addressing whether the incident was gang-related, the failure to challenge the prosecutor's questions was likely tactical.

Finally, even assuming defense counsel's decision to not object was made in error, any error was harmless because it is not reasonably probable that the outcome of the case would have been more favorable to Flores absent the identified questions. (See *Holt*, *supra*, 15 Cal.4th at p. 703; *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Even without the gang expert's specific opinions, there was a strong case for a jury to conclude Flores's actions were gang-related. While Flores himself testified he was no longer part of the gang, police identified him as an active gang member in an unrelated matter in June 2013, and Flores admitted he was a gang member at the time of that arrest.⁴ Additionally, gang member Herrera testified that Venegas disrespected Flores by failing to pay for or replace Flores's tablet, that Flores was an enforcer in the gang, and that Flores would have reacted strongly and aggressively to disrespect. Herrera also

⁴ He also admitted gang membership in 2005 and 2009.

testified that failing to retaliate after a theft would have made Flores look weak to the older generation of gang members, which could lead to getting "disciplined," or beat up.

Herrera testified other members of the gang helped retaliate against Venegas by setting him up and providing Flores with a gun. And after the shooting, word spread on the streets about what happened, which presumably sent a message that stealing from a member of the gang could result in a violent response. Additionally, although Herrera also testified that the dispute was more personal than gang-related, he admitted as part of his own plea agreement that the activity was gang-related. This other evidence supported the jury's finding that Flores's actions were at the direction of, for the benefit of, or in association with the gang. It is not reasonably probable the outcome would have been different without Detective Griffiths's testimony about whether the crime was gang-related.

Finally, the court issued CALCRIM Nos. 226 and 332, which instructed the jurors to assess witness credibility and ascertain the meaning and importance of any opinion, including by considering the hypothetical facts upon which an expert relied, and jurors are presumed to understand and follow the court's instructions. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.)

B. Firearm Enhancement

The parties agree the matter should be remanded for resentencing on the firearm enhancement in light of the amendment to section 12022.53, which now gives the court discretion to strike or dismiss firearm enhancements.

As of January 1, 2018, section 12022.53, subdivision (h) allows a court to exercise discretion under section 1385 to strike or dismiss a previously mandatory firearm enhancement at the time of sentencing. (*People v. Robbins* (2018) 19 Cal.App.5th 660, 678, 679; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) This discretion applies retroactively. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

When the trial court applied a consecutive firearm enhancement sentence of 25 years to life to the kidnapping charge, it was mandatory under section 12022.53, subdivisions (d) and (e) to do so. There is no indication about whether the court would have imposed this sentence had it known it had discretion (see *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no remand if record shows trial court would not have exercised discretion to reduce sentence]); thus, we remand the matter so the trial court may consider its discretion.

C. Prior Prison Terms

Flores contends the trial court erred by staying, rather than striking, the four prison term sentence enhancements imposed under section 667.5, subdivision (b) and urges us to correct the error at the appellate level. The Attorney General concedes the error occurred but notes the trial court's failure to state its reasons for striking the punishments for the enhancements warrants remand to correct the error, particularly in light of the court's discretion regarding the firearm enhancement.

A court does not have authority to impose an unauthorized sentence (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521), including the authority to stay the imposition of a sentence on an enhancement. (*People v. Eberhardt* (1986) 186

Cal.App.3d 1112, 1124.) Instead, "[a] trial court's discretion to dismiss an 'action' under section 1385(a) encompasses the power to strike or dismiss a sentencing enhancement." (*People v. Fuentes* (2016) 1 Cal.5th 218, 225.) Section 1385, subdivision (b) states that the court may strike an additional punishment for the enhancement in compliance with subdivision (a). Subdivision (a) requires the reasons to be stated orally on the record. Thus, the court must offer its reasons for striking an enhancement in the interest of justice in at least an oral pronouncement. (See *People v. Jones* (2016) 246 Cal.App.4th 92, 96-97; *People v. Jordan* (2003) 108 Cal.App.4th 349, 368; see also § 1385, subs. (a) & (b).)

Here, after the prosecutor explained the prison priors had to be imposed and stayed or stricken by the court, the court said, "The Court, on its own motion will strike in the interest of justice. I'll explain further as to why I'm going to do that." Flores admitted to the four priors; the court imposed a one-year sentence for each of them, and it stayed them all without stating reasons for doing so. Accordingly, we remand the matter to the trial court to consider its sentencing regarding the prior prison sentence enhancements and to make an oral pronouncement on the record of its rationale if it strikes them.

DISPOSITION

The matter is remanded to the trial court with directions to conduct a resentencing hearing to consider its discretion under section 12022.53, subdivision (h), regarding the firearm enhancement and to address the prior prison term enhancements imposed under section 667.5, subdivision (b), consistent with this opinion. The trial court is directed to prepare an amended abstract of judgment reflecting its sentencing decisions and to

deliver it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.